

Appellant: Whitney Durell
1310 Marquette Pl. NE
Albuquerque, NM 87106

Agent: R2 Consulting Services
12024 Paisano Ct. NE
Albuquerque, NM 87112

Applicant: Whitney Durell
1310 Marquette Pl. NE
Albuquerque, NM 87106

Agent: Tony Rivera
4156 Marble NE
Albuquerque, NM 87110

Site Location: 718 Riverside Dr. SW

Zone Designation: R-1 Single-Family Residential

Recommendation: Denial

VICINITY MAP

Summary: This request is an appeal of the Zoning Administrator's denial of a variance of 14 feet to the 26-foot height limitation. The appellant originally sought approval to construct a 40-foot, three-story accessory building in the rear yard of the subject property.

Since that time, however, the proposal has been modified, and the appellant now seeks a four (4) foot variance to allow the construction of an accessory building with an overall height of just 30 feet.

Staff Contact: Brennon Williams, Zoning Administrator

Attachments:

1. Appeal application
2. Notice of Decision (February 16, 2010)
3. Original application with provided site plan
4. Material presented in opposition to the request
5. Agency comments for ZA application
6. Site photographs, aerial photograph, zone atlas page

BA-20100009/ZA-20100012

R2 Consulting Services, Inc., agent for Whitney Durell, appeals the Zoning Administrator's decision in denying a variance of 14 feet to the 26 foot building height limitation on Tract 102F, MRGCD Map #44, located at 718 Riverside Dr. SW, zoned R-1, and containing approximately 2.98 acres. (M-13) (Original request submitted by Tony Rivera, agent for Whitney Durell)

BACKGROUND

The Request

The appellant is requesting that a previous determination of the Zoning Administrator in denying a variance of 14 feet to the allowed building height limitation be overturned. The current proposal, modified from the original application which sought approval for a 40-foot tall accessory building in the rear yard of the property, now requests authorization for a 30-foot tall structure.

The Property

The subject site is located at 718 Riverside Dr. SW, zoned R-1, and is approximately 2.98 acres in area. The property is currently developed with two (2) single-family dwellings (ZNCU-90018) and three (3) accessory buildings, including a garage, shed, and accessory living quarters.

The Hearing

The original request was presented at the Zoning Administration hearing held on February 9, 2009, in connection with a related application for conditional use approval to allow the proposed accessory building to be larger than the 600 square foot area limitation (ZA-20100008; *this conditional use was approved*). Whitney Durell, the property owner, and Tony Rivera, his agent, presented the request. Mr. Rivera explained that the proposed building – an 8,000 square foot art studio and workshop – would be used by Mr. Durell in connection to his artistic interests. Mr. Rivera stated that the overall size of the building would allow the property owner adequate room for working, creating, and related material storage. He also testified that although the 8,000 square foot size of the structure might first appear to be extremely large as compared to other buildings in the neighborhood, the total acreage of the subject property (almost 3 acres) would allow for the proper placement of the structure in accordance with county setback and separation requirements without creating a sense of overcrowding on the lot.

Mr. Durell also spoke, indicating that he had discussed and explained this component of the request to many of the adjacent neighbors, with most indicated that they were in support of the proposal. He also described the other design methods he had considered for the building, including its layout and placement on the lot, the incorporation of a basement to reduce the overall height of the structure, and the use of solar panels to provide necessary utilities to the structure.

Mr. Rivera testified that the requested height variance should be awarded because the property possessed exceptional features, including its large size as compared to other properties in the vicinity. He indicated that the increased area of the lot would inherently accommodate a larger-scale building by reducing the visual impact of the structure. He also noted that the proposed location of the studio/workshop (behind existing structures and several large trees on the property) would help to mitigate any adverse effects of the building, and that the property owner intended on planting additional trees once the structure was completed to further screen the building from view. Furthermore, Mr. Rivera pointed out that the placement of the studio/workshop on the lot would be consistent with the historical development patterns of the

neighborhood, with structures located toward the street and open spaces to the rear of the property.

Several neighbors appeared in opposition to the requests. Most of their concerns centered on the overbearing size and height of the accessory building, a lack of any other structures or features in the area of similar elevation, and a perceived "industrial" component that might be conveyed in a largely residential neighborhood of small lots and houses.

Upon rebuttal, both Mr. Rivera and Mr. Durell compared the proposed building to a large barn or agricultural shed, stated their willingness to add landscaping and screening to further hide the structure, and noted the significant effort made to design the studio/workshop in order to meet both the needs of the property owner, as well as adequately address the obvious concerns and expectations of nearby residents.

The Decision

Although the Zoning Administrator determined that the conditional use criteria could be met for the proposal, the 14-foot height variance was denied based on findings that the primary purpose for the request centered on the property owner's design wishes rather than an apparent hardship related to the land. The ZA conceded that the 3-acre size of the subject property was unique to many of the other lots in the area, but this feature did not result in an undue limit on the height of buildings and structures on the site.

APPLICABLE REGULATIONS

Comprehensive Zoning Ordinance of Bernalillo County.

Section 9. R-1 Single-Family Residential Zone.

- A. The regulations set forth in this section or set forth elsewhere in this ordinance, when referred to in this section, are the regulations in the R-1 Residential Zone. The purpose of this zone is to provide for the development of single-family homes on lots not less than three-quarters [of an] acre in area, except that where community water and sewer facilities are made available, the lot size may be reduced consistent with development densities in the Albuquerque/Bernalillo County Comprehensive Plan. The regulations provide for the health, safety and welfare of the residents.
- B. Use Regulations. A building or premises shall be used only for the following purposes, all uses customarily incidental to the building or premises shall be maintained on site:
 - 1. Prohibited Uses. The following uses are prohibited in this zone:
 - a. The open storage of inoperative vehicles or auto parts;
 - b. The open storage of trash or junk;
 - c. The open storage of large appliances;
 - d. Any use not designated a permissive use or conditional use in this zone, unless otherwise authorized by this Code; or
 - e. Any use not recognized as customarily incidental to a permitted use in this zone.
 - 2. Permissive Uses:
 - a. Agricultural activity, including truck gardening and nurseries, fur bearing animal farm, the raising of poultry or rabbits, dairy farming, livestock grazing, feeding, and the raising of livestock on lots containing three acres or more. On lots of less than three acres, there shall be at least 10,000 square feet of lot area for each cow or horse, and/or at least 4,000 square feet of lot area for each sheep, pig, or goat, provided that any building, pen, or corral where such animal is located is at least 20 feet from

- any existing dwelling unit. Stands for the display or sale of home-raised agricultural products, including poultry or rabbits raised on the premises.
- b. One single-family dwelling or H.U.D. Zone Code II manufactured home per lot.
 - c. Accessory building, structure, or use customarily incidental to the above uses, such building or structure shall be limited to an area of 600 square feet or less.
 - d. Noncommercial library, museum, and art gallery.
 - e. Recreational vehicle or boat storage in the rear yard when such recreational vehicle or boat is not to be used as accessory living quarters, and is not connected to utilities, other than temporarily to a source of electricity. Recreational vehicle used for dwelling purposes served only by electricity for lighting purposes, the use of such recreational vehicle shall be limited to a maximum of two weeks in any calendar year.
 1. In the event where rear yard access is not available, outside parking in the front yard is allowed, provided:
 - (a) The body of the recreational vehicle or boat is at least 11 feet from the front property line.
 - (b) No part of the unit extends onto the public right-of-way.
 - (c) A corner lot is always deemed to have reasonable access to the rear yard; a fence or wall is not necessarily deemed to prevent reasonable access.
 - f. Signs not exceeding eight square feet in area pertaining to the lease, hire, or sale of a premises or sale of home-raised products, provided there shall be no more than one such sign on each lot and provided further that, if illuminated, the source of such illumination shall be nonoscillating and nonflashing.
 - g. Parking incidental to uses permitted in this zone, provided all vehicles which are not parked inside a building are operative and are not wholly or partially dismantled.
 - h. Home occupation.
 - i. Concealed Wireless Telecommunications Facility, provided that it satisfies the requirements of section 22.5 of this ordinance.
 - j. Wireless Telecommunications Antenna located on a public utility structure, provided that it satisfies the requirements of section 22.5 of this ordinance.
 - k. Amateur Radio Antenna/Tower up to 65 feet as measured from grade.
 - l. Garage or yard sale, provided:
 1. No more than four events are allowed at a given dwelling in any calendar year. The duration of the garage or yard sale shall not exceed three consecutive days.
 2. No items shall be purchased for a garage or yard sale for the purpose of resale; items shall be of the type normally accumulated by a household.
 3. One non-illuminated, on-premise sign, not exceeding four square feet in area shall be permitted. The sign shall pertain to the garage or yard sale only and shall be permitted only for the three-day period of the sale.
3. Conditional Uses. The following uses may be permitted if approved by the Zoning Administrator in accordance with the procedures and under the conditions set out in the administrative Section of this ordinance with additional requirements deemed necessary to safeguard the best interest of the adjoining property, neighborhood and the community.
- a. Accessory building or structure in excess of 600 square feet in area and incidental to the uses listed under Section 7.B.1. and 7.B.2.
 - b. Amateur Radio Antenna/Tower 65 to 100 feet as measured from grade.
 - c. Church and incidental facilities.
 - d. School.
 - e. Day Care Center.

- f. Family Day Care Home.
 - g. Temporary festivals, circuses, carnivals or activities in a tent, provided that the use or activity meets the following requirements:
 - (1) The minimum lot size per use or activity shall be five acres.
 - (2) All required parking shall be located on the same site with the activity or use.
 - (3) The use or activity shall be at least two miles from the nearest conforming residential use.
 - (4) Prior approval of the proposed use or activity must be obtained from the County Sheriff, County Fire Department, County Environmental Health, County Public Works, City of Albuquerque Air Pollution Control, and Albuquerque Metropolitan Arroyo Flood Control Authority or their authorized representative.
 - (5) The hours of operation, shall be between 6:00 a.m. and 8:00 p.m. This includes the time of erection and dismantling.
 - (6) The use or activity shall be limited to three days in one calendar year.
 - (7) No permanent structures shall be erected.
 - (8) Temporary fencing may be erected, and shall be removed within 24 hours after the activity.
 - h. Real estate sales office and real estate signs exceeding the limitations in Subsection 8.B.(1).f. above in connection with a specific development for a period of not more than two years.
 - i. Recreational facility (nonprofit) such as swimming pools or tennis clubs on sites containing not less than one acre.
 - j. Temporary storage building or yard for equipment, material or activity incidental to a specific construction project but not to exceed one year, unless the time is extended by the Zoning Administrator.
 - k. Mobile home used as a dwelling (with connections to any utilities) during construction of a dwelling on the same premises, provided such use shall be limited to a maximum period of 24 months.
 - l. One mobile home for a three-year period in addition to an existing single-family dwelling or mobile home on a lot provided it complies with the following requirements:
 - (1) The mobile home may be used only by members of the immediate family for the purpose of providing assistance to those members of the family who are elderly, ill, mentally or physically disabled as attested by a licensed physician.
 - (2) The mobile home shall be connected to water and sewage disposal facilities approved by the Department of Environmental Health.
 - (3) The mobile home must be placed on the property in conformance with the setback requirements and located at least 15 feet from any structures on the same or on adjoining property.
 - (4) Placement of a mobile home on the property will not seriously conflict with the character of the area or be detrimental to the values of surrounding properties.
 - m. Nonprofit animal facility.
 - n. Park.
 - o. Home occupation where the business includes visits to the site from clients, customers, patients, patrons, or similar individuals. Such home occupations may allow for employment of one non-family member and may be approved for a period of time not to exceed three years.
- C. Height Regulations. Buildings and structures shall not exceed 26 feet or 2 1/2 stories in height, except as provided in The Supplementary Height and Area Regulations Section of this ordinance.

D. Area Regulations:

1. Minimum Lot Area and Lot Width. Every lot shall have a minimum area of not less than three-quarters [of an] acre and a minimum lot width of 60 feet, except that where community water and sewer facilities are available, the lot area may be decreased to 8,000 square feet if located in the Developing, Established or Central Urban Areas, or 14,520 square feet if located in the Semi-Urban Area of the Albuquerque/Bernalillo County Comprehensive Plan.
2. Front Yard.
 - a. There shall be a front yard having a depth of not less than 20 feet except as provided in the Supplementary Height and Area Regulations Section of this ordinance.
 - b. Where lots have double frontage, the required front yard shall be provided on both streets.
3. Side Yard:
 - a. Except as hereinafter provided in the following paragraph and in the Supplementary Height and Area Regulations Section of this ordinance, there shall be a side yard on both sides of a building the aggregate width of which shall be not less than 14 feet, provided, however, that neither such yard shall be less than six feet in width.
 - b. Wherever a lot of record, at the effective date of this ordinance, has a width of less than 60 feet, each side yard may be reduced to a width of not less than ten percent of the width of the lot, but in no instance shall it be less than three feet.
4. Rear Yard. Except as hereinafter provided in the Supplementary Height and Area Regulations Section of this ordinance, there shall be a rear yard having a depth of not less than 15 feet.

E. Parking Requirements. Off-street parking for all uses must be provided in accordance with the regulations set forth in the Off-street Parking, Loading and Unloading Regulations Section of this ordinance.

Section 24.A.2. Administration. Zoning Administrator. Powers and Duties.

h. Investigation of Applications:

- (1) Investigate all applications for variances from the height, area, parking or density regulations of this ordinance, and to grant such applications to the extent necessary to permit the owner reasonable use of his land in those specified instances where there are peculiar, exceptional, and unusual circumstances in connection with a specific parcel of land, which circumstances are not generally found within the locality or neighborhood concerned.
- (2) Investigate all applications for an extension of the time limitations authorized by the Nonconforming Use Regulations Section of this ordinance or for an expansion of up to 25 percent of the original floor area for residential uses in residential zones, and to grant such applications if the use does not seriously conflict with the character of the surrounding area and in case of expansion of the use the site is adequate in size and shape to accommodate such expansion and the expansion does not increase the number of dwelling units on the lot or in any structure.

Section 24.B. Administration. Board of Adjustment.

3. Powers and Duties. The Board of Adjustment shall have the following powers:

- a. To hear and determine appeals where it is alleged there is error or abuse of discretion in any order, requirement, decision or determination made by the Zoning Administrator in the enforcement of the provisions of the ordinance.
- b. To hear and determine appeals from the rulings, decisions, and determinations of the Zoning Administrator granting or denying applications for variation from any requirements of this ordinance or granting or denying applications for conditional use permits authorized by this ordinance.

Agency Comments

Comments received for this request from the Bernalillo County Building Department stated that proper permits would be required for the proposed building. The Environmental Health Department recognized that the property was connection to municipal water and sewer services. The Bernalillo County Public Works Division had no adverse comment to the proposal.

INFORMATION SUBMITTED FOR THE APPEAL

The appellant notes that the variance request has been modified. At the ZA level, a 14 foot variance to allow for a 40-foot tall building, was proposed. Now the appellant indicates that “a variance of 4 to 6 (feet)” is requested to allow for a total building height of either 30 or 32 feet in an effort to address “concerns expressed by some neighbors”. The appellant also reiterates his belief that the property possesses unique circumstances which provide potential for the proposed building height to be considered appropriate. These include protections for solar access for adjacent properties, a floor-area-ratio of the subject site that is less than other lots in the area, and the existence of large trees on the site.

ANALYSIS OF SUBMITTED MATERIAL

The 26-foot, 2½- story height limitation in the zoning ordinance applies to all residential properties in the unincorporated areas of the county. Consequently, any residential building proposed to be greater than the established limit needs an “exceptional, peculiar, and unusual” reason [ref. Sec. 24.A.2.h.(1)] to exceed the standard that affects everyone else. This is not an easy task to accomplish. Case law has consistently shown that variances are to be granted sparingly and only when they are absolutely necessary to grant the property owner the same rights and privileges that others are afforded. Multiple variances tend to indicate that the applicable standard is either insignificant or not consistently implemented. The true purpose of a variance is much more important than simply permitting a slight deviation that will reportedly go unnoticed by supportive neighbors.

There really is no such thing as a “simple” variance request. Justification for approval should be reserved only to allow an owner reasonable use of their property, preventing them from suffering an unnecessary hardship. From a land-use perspective, this is not determined by merely an owner’s desire to complete their project as quickly as possible or their reluctance to accomplish the necessary steps due to the financial cost; but rather, it’s revealed in whether or not the property owner will be completely unable to use the subject site for any purpose outlined in the ordinance without the variance being awarded. If there is the possibility to use the site for any activity, no matter how remote or undesired it may be by the owner, the law has shown that a variance cannot be granted, as the property still possess an ability to produce a “reasonable use”. The proper measurement of reasonable use is established when without the granting of the variance, the subject property will be rendered completely useless and incapable of allowing any activity outlined, expected, or anticipated by the ordinance.

Similarly, a true hardship is determined only when an owner can prove that a specific requirement of the legislation affecting the property – not the property owner – is in a way that is completely (and unfairly) different from its impact on other land in the community. Simple complaints that an owner's burden to meet a particular standard are perceived as being onerous and unnecessary do not meet the criteria for approval. Reported difficulties should be judged in relation to the standards that apply to everyone else, whether or not they have the same amount of money, time, expertise, or understanding as the applicant.

Compliance with the standards cannot be negotiated. Claims that a proposed variance is merely a slight, inconsequential allowance are incorrect. This is neither a deficiency with the applicable regulations, nor indifference from county staff toward the property owner concerning their request. It is entirely related to the knowledge and understanding that the requirements outlined within the zoning ordinance – even those related to the height of buildings – is the minimum necessary to be consistent with all other development within the residential zones in the county.

Analysis Summary

CRITERIA	APPEAL INFORMATION	STAFF ANALYSIS
Property possesses "peculiar, exceptional and unusual" circumstances?	- The large size of the property provides "potential for the proposed building height to be considered appropriate" to allow the structure to exceed the limit.	- The reported unique feature does not unjustly limit development on the property, but rather, it provides the owner with more area and opportunity to properly place the building. - No evidence has been provided showing that a structure exceeding the height limitation is an anticipated, existing feature in the neighborhood or R-1 zone.
The reported unique circumstances affect only the subject site and are not found within the immediate area?	- This issue has not been addressed in the materials provided for the appeal.	- The reported unique feature does not unjustly limit development on the property, but rather, it provides the owner with more area and opportunity to properly place the building. - Undue hardship is not evident; the existing limitation on building height in all residential zones is applied impartially throughout the immediate area/neighborhood.
The requested variance is limited to the extent to allow the owner reasonable use of the land?	- This issue has not been addressed in the materials provided for the appeal.	- Reasonable use means that without the granting of the variance, the subject property will be rendered valueless; such is not the case in this situation.

CONCLUSION

The Zoning Ordinance authorizes the Board of Adjustment to hear and determine appeals from the decisions of the Zoning Administrator in denying variance applications. However, based on the information provided with the appeal, as well as consideration of the materials and testimony provided by all parties for the original application, staff respectfully submits this matter to the BA with the following recommendation:

RECOMMENDATION

Denial of BA-20100009/ZA-20100012, thereby upholding the previous determination of the Zoning Administrator.

Brennon Williams
Zoning Administrator